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Travis County
D-1-GN-11-003130

Cause No. D-1-GN-11-003130

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al.	§	**IN THE DISTRICT COURT**
vs.	§	
MICHAEL WILLIAMS, et al.	§	**OF TRAVIS COUNTY, TEXAS**
Consolidated Case:	§	
MARIO FLORES, et al.,	§	
vs.	§	
MICHAEL WILLIAMS, et al.,	§	**200TH JUDICIAL DISTRICT**

CHARTER SCHOOL PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPLICATION FOR AN AWARD OF ATTORNEYS' FEES
(Second Phase)

The Court has directed the plaintiff groups to submit affidavits in support of pleadings requesting attorneys' fees. Since this Court initially denied an award of fees to the Charter School Plaintiffs [1] (hereinafter called "Charter Plaintiffs"). The Charter Plaintiffs accompany their renewed application for award (*See* Affidavit of Robert A. Schulman (Second Phase))[2] ("Schulman Aff'd II") with this Memorandum in Support of the Application for an Award of Attorneys' Fees. Affiant Schulman was lead counsel for the Charter Plaintiffs in this litigation and trial counsel during its first phase. Leonard J. Schwartz was trial counsel for the second segment. Both are highly accomplished counsel and widely known throughout the State

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[1] The Charter School Plaintiffs consist of parents filing on behalf of their children, who are students in Charter Schools, and the Texas Charter Schools Association, a voluntary nonprofit 501c3 association whose membership includes almost all the 209 Texas open-enrollment charter schools with over 500 campuses in Texas.

[2] Mr. Schulman is the majority partner of Schulman, Lopez & Hoffer, LLP, in San Antonio, Texas, and has been practicing law in Texas since 1975.

of Texas by other attorneys as experts[3] in the school law. The undersigned is one of the few recognized legal authorities in Texas charter school law.

The Charter Plaintiffs filed this suit on several theories, including: [4]

(a) The "general diffusion of knowledge" clause in Article VII, section 1 of the Texas Constitution, is violated because charter schools lack adequate funding to reasonably provide all their students with a meaningful opportunity to learn the essential knowledge and skills reflected in the state curriculum, and to graduate at a college-ready or career-ready level (a "general diffusion of knowledge");

(b) A violation of the efficiency requirement of that same Article and section because the school finance system fails to provide "efficient and non-arbitrary" access to revenues to open-enrollment charter schools, including funding for facilities;

(c) A violation of that Article and section's suitability requirement in that the arbitrary denial of facilities funding, a necessary component for suitability and efficiency, impedes the progress toward an efficient system of public schools;

(d) A violation of that Article and Article I, section III of the Texas Constitution, the Equal Protection Clause, on the grounds that the Legislature does not provide charter schools with substantially equal access to revenues and the funding adjustments available to independent school districts, including the arbitrary omission of facilities funding creating inefficiency in the funding system;

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[3] The term expert, as used herein, is used generically to mean an attorney who has a comprehensive and authoritative knowledge of or skill in a particular area. The State of Texas does not have a Certification of Legal Specialization in the area of school law, nor does this pleading come within the meaning of an "advertisement" as that term in used in Tex. St. Disc. R. P. C. 7.02.

[4] *See* Plaintiffs' Fifth Amended Original Petition and Request for Declaratory Judgment, No. D–1–GN–11–003130, filed November 21, 2013, which is made a part hereof by reference.

(e) A violation of Article I, section III of the Texas Constitution, challenging the 215 maximum open-enrollment charter school cap as being arbitrarily established and existing without rational basis.

After the initial phase of the trial, the Charter Plaintiffs sought attorneys' fees. The application for attorneys' fees, including the affidavits and other documents submitted as part thereof, is hereby incorporated herein by reference[5] and the Charter Plaintiffs advance once again these prior filings in support of this application for an award of attorneys' fees.

The preparation for the second phase of the trial involved meetings and interviews with potential and selected fact witnesses, potential and selected expert witnesses, meetings with clients and charter school operators, review, analysis, and production of volumes of client documents and documents produced by other Plaintiffs, the Interveners and the State Defendants, review and analysis of numerous expert reports, consultations with expert witnesses, written discovery, and the depositions attended, defense of and/or reviewed depositions of factual and expert witnesses. Schulman Aff'd II. The second phase of trial lasted 11 days, during which multiple witnesses testified in person, and more than 679 exhibits were admitted into evidence. The trial was conducted in a "paperless" fashion, requiring the imaging and management of exhibits presented electronically at trial.

In exercising its discretion regarding this Application for an Award of Attorneys' Fees, the Court is reminded of the following:.[6] Despite having existed since 1995, charter schools were

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[5] "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule 65." Tex. R. Civ. P. 58.

[6] The overall standard for determining whether or not to award attorneys' fees was set by the Texas Supreme Court in *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). There the Court ruled that it was "an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, *e.g., Goode v. Shoukfeh,* 943 S.W.2d 441, 446 (Tex.1997), or to rule without supporting evidence, *Beaumont Bank v. Buller,* 806 S.W.2d 223, 226 (Tex.1991)." While the Charter Plaintiffs do recognize the numerous appellate court decisions

but spectators during *Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (*West Orange Cove I*) and *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005) (*West Orange Cove II*). Having been designated by the Legislature as a primary implementer of the Texas public school system, and so recognized by the *West Orange Code II* decision, the entry of open-enrollment charter schools (Charters) into this lawsuit marked the first time since the 1991 landmark decision, *Edgewood Indep. Sch. Dist. v. Kirby,*[7] and the multiple subsequent school finance jurisprudence it spawned, that these public schools joined their sister school districts in challenging the constitutionality of the Texas public school finance system. This is highly significant, as previously, whenever the legislature was required by an adverse ruling on school finance to fix the system, charters were the "also ran" public system entities, and had not previously been appreciated as an equally important component of the free public system entitled to constitutional protections as are our school districts. Thus, notwithstanding the "trickle down" benefits appreciated by all publicly-funded schools when funding amounts are increased system-wide, Charters were not previously considered by the Texas Legislature in its attempts to fashion court-ordered fixes to the system.

Assuming the Supreme Court affirms this Court's recognition of the constitutional protections applying to these public schools Charters have taken their rightful place at the Legislative table. That Charters are definitively in this case. and entitled to all or part of their constitutionality claims, significantly changes the legal and legislative landscape for these schools, entitling them, for such reason alone, to an award of fees for having achieved this precedent.

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affirming and finding no abuse of discretion in denying attorneys' fees neither the Texas Supreme Court nor any of the intermediate courts of appeal has previously addressed the situation presented here, the entitlement of public charter schools to constitutional state funding. Moreoever, this lawsuit involved multiple plaintiff groups that, collectively, were successful litigants awarded fees; among them were the Charter Plaintiffs.

[7] 777 S.W.2d 391 (Tex. 1989).

To date, we are informed that Charters prevailed on their claim that the funding amounts are constitutionally inadequate and that funding formulas used by the State of Texas are constitutionally unsuitable as applied to Charters,[8] a claim that was not advanced by the ISD Plaintiffs, or by the Interveners, but only by the Charter Plaintiffs. Assuming this decision would adopt the format of all prior school finance decisions, addressing the individual claims of each of the Plaintiffs, this Court is unlikely to have addressed the Charters were they not present in this suit.. Moreover, assuming *arguendo* that even in their absence, Charters would have been addressed in this Court's decision, the State of Texas, in subsequent interpretations of the decisions, could dismiss references to Charters as mere *dicta*.

Secondly, the Charters appear here as plaintiffs, not mere interveners. Having filed their own lawsuit against the State,[9] claiming the school finance system was fundamentally flawed, and that it violated Art. VII, § 1 of the Texas Constitution, Charters were consolidated into this ongoing case upon request of Defendants, and with the express approval of this Court on August 17, 2012. As demonstrated by the results in this case, had the Charters' case remained under its own docket and proceeded to trial under the original filing, the Charter Plaintiffs would most likely have recovered fees and, certainly, their costs. Moreover, with regard to the overall unconstitutionality of the public school funding system, all Plaintiffs groups, including the Charters have made major contributions to this litigation, and they were all more or less important to the outcome. Not always united in presentation, the Plaintiffs were never apart in

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[8] Although required by most other statutes that allow an award of attorneys' fees, fees in declaratory judgment cases may be allowed even if the party is not "prevailing." *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 706 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("A party need not prevail to be awarded attorney's fees under the Declaratory Judgments Act."); *accord*, *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 701 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Hunt v. Baldwin*, 68 S.W.3d 117, 135 (Tex. App.-Houston [14th Dist.] 2001, no pet.).

[9] *Mario Flores v. Robert Scott,* Docket No. D–1–GN–12–001923 (filed 12 June 26 in the 53rd Judicial District Court of Travis County, Texas).

purpose. The Plaintiffs' attack on the constitutionality of the current funding system was a group effort. As such, the Court should not wholly deny the fee requests of any one of the Plaintiffs. As such, we remind the Court that, the Calhoun County Plaintiffs' faction was not successful on all of its claims, and yet was awarded fees for the entirety of its work. In fact, ISD Plaintiffs opposed and attempted to counter each others' contentions, a situation hardly applicable to the Charter Plaintiffs. It follows, *a fortiori*, that successful outcome of this case was a joint, collective effort, so that the Court should not wholly isolate any of the participants on the Plaintiffs' side so as to wholly deny them fees.

In fact, the Charter Plaintiffs efficiently and effectively participated in the entire trial, attended depositions, deposed and cross–examined witnesses, and presented witnesses of their own. Each of the Plaintiff factions created their own proofs, assisting, in some cases by design, in others by common purpose, the other Plaintiff groups in presenting their individual stories; and the same was true for the Charter Plaintiffs. Presenting last of all the Plaintiffs groups, and having following the Court's instruction to be economical and resourceful, the Charter Plaintiffs presented their case without offering redundant evidence or proofs previously submitted, offering and eliciting instead, only testimony and cross–examination when needed and not repetitive. Charters should not now be penalized for having so well followed the Court's instructions.

True, much of the evidence of the ISD Plaintiffs concerning the inadequacy and unsuitability of the funding formulas used by the State benefitted the Charter Plaintiffs. But, the reverse is also true. For instance, Charter Plaintiffs' expert witness, Toni Templeton, presented a "range analysis" of all Charter Schools and all School Districts, analyzed by Weighted Average Daily Attendance ("WADA"), an analysis that importantly demonstrated that funding for Charter Schools is clustered within a very narrow range of WADA. Separate from the Charter proofs,

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and applied to, but unique from the WADA funding evidence introduced by the Plaintiffs and Interveners, Ms. Templeton's expert testimony equally illustrated the unconscionably large gap in WADA existing between property poor and property rich school districts, a proof perhaps not welcome to all the ISD Plaintiffs, but one that was gratefully adopted by others.

In fact, Ms. Templeton's "range analysis" was the only data submission of its kind, and was one of the more telling proofs submitted to prove the case brought by both the MALDEF Plaintiff group and the TTSFC Plaintiff group. Similarly, Ms. Templeton provided the range of scores on the SAT/ACT[10] as evidence of "college ready," that again provided evidence supporting the proofs required for all Plaintiff factions.

Given the above, the Court is requested to use its discretion to award of attorneys' fees to all Plaintiff groups to include the Charters.[11] Moreover, given the exceedingly high cost in terms of attorneys' fees for school finance cases, the Court is asked to favorably consider this award in order to encourage future, non–profit associations, such as the Plaintiff, Texas Charter Schools Association, to undertake the financial encumbrance of protecting the School Foundation Program and ensuring that the State of Texas fully meets its constitutional obligation of providing for the "general diffusion of knowledge being essential to the preservation of the liberties and rights of the people," and complying with its responsibility "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

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[10] While some think that "SAT" stands for Scholastic Assessment Test, this is a misnomer. The test that is used by numerous colleges and universities for helping determine an applicant's qualifications for admission, is titled "SAT." The ACT was formerly called the American College Testing Assessment but is now, in a similar manner as the SAT, called the ACT.

[11] We do recognize that in the context of an award of attorneys' fees, "'[a]n abuse of discretion exists only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias.'" *Model Laundries & Dry Cleaners v. Amoco Corp.*, 216 Mich. App. 1, 4, 548 N.W.2d 242, 244 (Mich. Ct. App. 1996) (*quoting Wojas v. Rosati*, 182 Mich. App. 477, 480, 452 N.W.2d 864 (1990)). However, given that the Court has awarded all the other Plaintiff groups their rewards without carving out how each helped in the final outcome, or segregated out the redundant proofs by each, it would seem that logic demands a fee award for the Charter Plaintiffs, too.

Tex. Const. art. VII, § 1. As such the denial of fees to the Texas Charter Schools Association will send the wrong message to other comparable groups that would protect public education, discouraging these organizations from future participation on behalf of the school children of Texas. *See*, *e.g.*, *Martin v. Heckler*, 773 F.2d 1145, 1149–50 (11th Cir.1985) (*en banc*) (one of the primary purposes of fee award statutes is "to encourage civil rights enforcement by plaintiffs acting as 'private attorneys general'." In a case where the defendants are, like here, a governmental entity, "'the plaintiffs are not merely "private attorneys general," they are the only attorneys general.'" Citation omitted). To deny this nonprofit its due, would be contrary to good public policy. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the [ ] courts"); *cf. Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 533 (Tex. 1995) (stating that limiting attorneys' fees to a modest amount would not result in a claimant being denied needed legal representation; obviously a total denial would have just this result); *Martin v. Heckler*, 773 F.2d 1145, 1150-51 (11th Cir. 1985) ("Where parties prevail in vindicating important rights, but receive little or no financial benefit as a result of that litigation, it [is] considered unfair for those parties to bear their own attorney's fees."). And, while courts are normally accorded wide discretion in allowing fees, a court's discretion to deny fees altogether, at least under federal law, which should be instructive in the absence of state law guidance, is "exceedingly narrow." *Maloney v. City of Marietta*, 822 F.2d 1023, 1025 (11th Cir. 1987).

We also bring to the Court's attention a voting rights case brought by six African–American residents and voters of Bulloch County, Georgia, against the Commissioners of

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Bulloch County under Section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973, and under the Fourteenth and Fifteenth Amendments to the United States Constitution. *Love v. Deal*, 5 F.3d 1406, 1407 (11th Cir. 1993). After successfully prosecuting the case, the plaintiffs filed a motion for attorneys' fees pursuant to 42 U.S.C. § 1988(b).[12] The district court entered an order finding that the plaintiffs were "prevailing parties." "Nevertheless," according to the appellate court, "the district court awarded fees to only one of the plaintiffs' two attorneys."

In reversing, the Eleventh Circuit explained what is meant by the "special circumstances" which should exist for a court to deny attorneys' fees, in the context of multiple counsel,[13] quoting the Supreme Court's opinion in *Newman v. Piggie Park Enters., Inc.,* 390 U.S. at 402 ("one who succeeds in obtaining an injunction…should ordinarily recover an attorney's fee unless special circumstances would render an award unjust."). While its examination was addressed to federal law, its explanation of the use of "special circumstances" applies to our Texas Supreme Court's judicially created rule on the use of discretion in Declaratory Judgment Act attorneys' fees cases. Because the standard "is a judicially created concept," "it should be construed narrowly so as not to interfere with the [legislative] purposes behind the fee award statutes." 5 F.3d at 1410. After so constricting the term "special circumstances," the Court

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[12] 42 U.S.C. § 1988(b) reads, in relevant part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C.A. § 1988(b).

[13] The appeals court also reversed the lower court for failing to hold an evidentiary hearing on the application prior to denying the application for fees since, it held, that "[a]lthough an evidentiary hearing is not always necessary, 'where there is a dispute of material historical fact ... an evidentiary hearing is required.'" *Love v. Deal*, 5 F.3d 1406, 1409 (11th Cir. 1993) (quoting *Norman v. Housing Auth. of Montgomery,* 836 F.2d 1292, 1305 (11th Cir. 1988).

remanded to determine a proper reward for the second attorney. This result is apropos and should be replicated here.

Taking into consideration the factors set forth in Rule 1.04 of the Texas Disciplinary Rules for Professional Conduct, and the factors set forth in *Arthur Andersen & Co. v. Perry Equipment Corporation*, 945 S.W.2d 812, 818 (Tex. 1997), the fees set forth in Schulman Aff'd II are reasonable and necessary.[14] More specifically, the fee application takes into consideration the novelty and difficulty of the questions involved, the significance of the issues involved, the fee arrangement with the clients, the skill required to perform the legal services, the time limitations imposed by the circumstances, the experience, reputation, and ability of the attorneys, the benefit conferred, and the time and labor required. Based on all of these, and all of the factors set forth in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, and the *Arthur Andersen* factors, it is obvious that all of the services rendered by counsel for the Charter Plaintiffs in the prosecution and trial of this case were necessary, and the amount of time spent and rates charged for such services (as reflected in the time records) are reasonable, and that a reasonable and necessary fee for the Charter Plaintiffs for the prosecution of this matter by Schulman, Lopez & Hoffer, LLP, through January 31, 2014 is $645,970.50.

In an abundance of caution, and not wanting to run afoul of the Supreme Court's decision in *Tony Gullo Motors L L.P. v. Chapa,* 212 S.W.3d 299 (Tex. 2006), regarding segregation of fees, the Charter Plaintiffs have reduced their total bill so that they are not asking for fees in excess of those that should be awarded for their successful claims. While the Charter Plaintiffs

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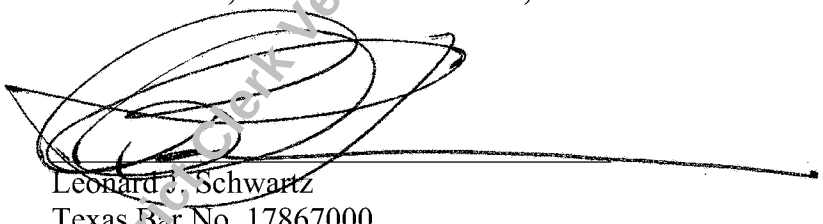
[14] As early as 1983, Mr. Schwartz was recognized as "highly regarded in his field" and a highly skilled trial attorney." *Texas State Teachers Ass'n v. San Antonio Indep. Sch. Dist.*, 584 F. Supp. 61, 65, 66 (W.D. Tex. 1983). At that time, he was awarded an hourly rate of $125.00. If simply adjusted for inflation, the rate would be approximately $300.00. Of course, he has since gained additional knowledge and proficiency which is reflected in the rate requested. Mr. Schulman, too, has 40 plus years of experience as an attorney practicing in the area of school law. The Court can take judicial notice that Austin attorneys who are considered experts in their fields charge $500.00 per hour or more.

joined the school districts in the District Court's declaration of the unconstitutionality of the current public school finance system, they did not prevail on their Article I, Section III, Equal Protection claims regarding the absolute denial of facility funding and the establishment of a statutory maximum number of allowable open-enrollment charter schools. However, the time involved in the preparation and prosecution of these pure law claims was insignificant in comparison to the Charter Plaintiffs' other fact and law claims.

Respectfully submitted,

SCHULMAN, LOPEZ & HOFFER, L.L.P.



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CERTIFICATE OF SERVICE

The undersigned certifies that on February 28, 2014 a true and correct copy of the foregoing was served upon the following counsel of record *via* e-mail pursuant to the agreement of the parties and in compliance with the Texas Rules of Civil Procedure:

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